the contract between Tyler Gas and United "had already been modified in what seems to have been an adversary proceeding." 215 F. 2d 883, 884, fn. 3. In fact, that contract was modified in the same way and at the same time as was the contract between United and Mobile, i.e., by the filing of a "conversion" tariff pursuant to Rule 154.82 of the Rules of the Federal Power Commission, which required the restatement of rates in specific dollars and cents terms. The effect of the restatement of the rates to Tyler Gas was to increase slightly the industrial rate and decrease slightly the domestic rate. There was no proceeding, adversary or otherwise, respecting this filing. While the conversion tariff was under consideration by the Commission Tyler Gas wrote a letter to the Commission protesting the increase in the industrial rate. That letter was not a formal complaint. Federal Power Commission Rule 1.6 (b). Only formal complaints "will initiate formal proceedings or make complainant a party to proceedings already initiated." Federal Power Commission Rule 1.6 (a) (2). The letter thus did not make Tyler Gas a party to any proceeding or raise any issue for decision by the Commission. Furthermore, the Commission neither passed on the merits of any claim in connection with United's conversion rates, nor approved the rates. It simply issued an order accepting the rates for filing and permitting them to take effect. That order expressly recited that its issuance was not approval of any "service, rate, charge, classification, or any rule, regulation, contract, or practice . . . nor . . . recognition of any claimed contractual right or obligation."

The letter of Tyler Gas protesting the conversion tariff did not and could not raise the issue of the right of United unilaterally to violate its contracts by a voluntary filing under Section 4 of the Natural Gas Act. It is to be emphasized that United's conversion tariff was filed in compliance with Rule 154.82 of the Federal Power Commission, requiring the rates provided in contracts to be restated in dollars and cents per unit. Rule 154.83 required the restatement by a date certain. United thus did not file its conversion tariff voluntarily. Indeed, in *United Gas Pipe Line Co.* v. *F. P. C.*, 181 F. 2d 796, it sought to challenge the Rule in the United States Court of Appeals for the District of Columbia Circuit. The Court did not pass on the validity of the Rule but dismissed the petition for review on the ground that the Rule was issued in the exercise of the Commission's rule making and not its judicial or quasi-judicial authority, and was therefore judicially reviewable only in the District Court by way of a suit for injunction or defense of an action to enforce compliance with it.

Thus the only issues Tyler Gas could raise in connection with the filing of the conversion tariff were the authority for and the appropriateness of the rule of the Federal Power Commission requiring the modification of the contract between Tyler Gas and United. The issue in the *Tyler* and *Mobile* Cases is not the propriety or appropriateness of any action of the Federal Power Commission finding contracts unjust, unreasonable or otherwise improper and requiring them to be modified. On the contrary, the issue is whether such action is a pre-requisite to their modification.

In any event, the modification of the contracts effected by the Commission in its order of July 31, 1952, under Rule 154.82 did not destroy the contracts. They are in effect as modified. Rule 154.85 of the Commission specifically provides that existing contracts modified by Rule 154.82 remain in effect except to the extent that they are superseded by filings under Rule 154.82. Since the contract between Tyler Gas and United precludes an increase in rate during the term of the contract, it necessarily precludes the filing of an increase under Section 4 of the Natural Gas Act. This result is clearly contemplated by the Rules of the Federal Power Commission. Rule 154.38 (d) (3) provides that a natural gas company *may* include in its contract the reservation of a right to propose to the Commission changes in the effective rates, provided that the reservation effectuates changes only in the manner provided in Section 4 of the Natural Gas Act. United having failed to reserve a right to propose rate changes, it is bound to the contract rates absent a finding and order by the Federal Power Commission under Section 5 of the Act.

The second ground upon which the Court of Appeals for the Third Circuit sought to distinguish the *Tyler* Case from the *Mobile* Case was the statement quoted from the District Court's opinion in the *Tyler* Case that "plaintiff's concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, . . ." 215 F. 2d 883, 884, fn. 3.

Tyler Gas and City did not concede that the Commission could fix rates at variance with the contract rates in a proceeding under Section 4(e) of the

Natural Gas Act. All that they conceded was that, as a result of an appropriate hearing, i.e., a hearing under Section 5 of the Natural Gas Act, the Federal Power Commission could, if it first set aside the contracts, fix rates other than the contract rates. The imprecise language of the District Court is understandable since the hearing and argument before it were addressed solely to the prayer for a preliminary injunction preventing United from moving to lift the suspension of its increased domestic rates pending a determination of the legality of its filing under Section 4 of the Natural Gas Act. The City and Tyler Gas challenged the legality of that filing both in Docket G-2210 before the Federal Power Commission and in their complaint in the District Court. As the Court of Appeals for the Fifth Circuit correctly said, they insisted "that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful." 217 F. 2d 73, 77.

The third ground upon which the *Mobile* Case sought to distinguish the *Tyler* Case is that the former involved only industrial rates while the latter involved domestic rates, increases in which, unlike increases in industrial rates, can be suspended by the Federal Power Commission for a period of five months. The Court is correct if it meant to say that the issue in the *Tyler* Case on the application for a preliminary injunction concerned only domestic rates. It is incorrect if it meant to say that the City and Tyler Gas did not

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY, *Petitioner*,

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION, *Respondents*.

No. 31

FEDERAL POWER COMMISSION, *Petitioner*,

v.

MOBILE GAS SERVICE CORPORATION.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM BRIEF IN SUPPORT OF MOBILE GAS SERVICE CORPORATION FOR THE CITY OF TYLER, TEXAS AND TYLER GAS SERVICE COMPANY AMICI CURIAE

TROY SMITH,
Citizens National Bank Building,
Tyler, Texas,
City Attorney of Tyler, Texas.
THOMAS B. RAMEY,
Citizens National Bank Building,
Tyler, Texas,
BLYCE REA, JR.,
Munsey Building,
Washington 4, D. C.
Counsel for City of Tyler, Texas, and Tyler Gas Service Company.

Of Counsel:
RAMEY, CALHOUN, BRELSFORD & HULL,
Citizens National Bank Building,
Tyler, Texas.

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